(3)

No. 91-1009

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD NEAL SCHOWENGERDT,

Petitioner,

v.

THE UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; CHARLES W. KESSEL; K.D. TILLOTSON; CARL W. JENSEN; and RICHARD S. DAY,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS GENERAL DYNAMICS CORPORATION AND CHARLES W. KESSEL

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QUESTION PRESENTED

Whether the Ninth Circuit was correct in affirming the district court's factual determination that, based upon the operational realities of petitioner's workplace, petitioner did not have a reasonable expectation of privacy in his office credenza sufficient to implicate the Fourth Amendment.

STATEMENT OF INTERESTED PARTIES

All parties to the proceedings below are named in the caption. Pursuant to Supreme Court Rule 29.1, the following is a list of the subsidiaries of respondent General Dynamics Corporation: American Overseas Marine Corporation; Amsea Services Corporation; Applied Remote Technology, Inc.; The Cessna Aircraft Company; Cessna Finance Corporation; Cessna Fluid Power-Europe, Inc.; Cessna Foundation, Inc.; Pawnee Industrial District; United Hydraulics Corporation; Wallace Industrial District; Concord I Maritime Corp.; Braintree I Maritime Corp.; Concord II Maritime Corp.; Braintree II Maritime Corp.; Concord III Maritime Corp.; Braintree III Maritime Corp.; Concord IV Maritime Corp.; Braintree IV Maritime Corp.; Concord V Maritime Corp.; Braintree V Maritime Corp.; Electrocom, Inc.; Emetrics, Inc.; Etudes Techniques et Constructions Aerospatiales, Societe Anonyme (ETCA); GD Financial Corporation; General Dynamics (C.I.) Limited; General Dynamics Credit Corporation; General Dynamics Commercial Launch Services, Inc.; General Dynamics Export Sales Corporation; General Dynamics Foreign Sales Corporation; General Dynamics-Hellas, S.A.; General Dynamics International Corporation; General Dynamics International Services, Inc.; General Dynamics Land Systems Inc.; General Dynamics Land Systems International, Inc.; G. T. Devices, Inc.; General Dynamics Services Company; GD Ho-Chin, Incorporated; General Dynamics Base Corporation; General Dynamics Nevada Company; Helava Associates, Inc.; Hellenic Business Development & Investment Co., S.A.; Material Service Corporation; Darlington Brick & Clay Products Company; EPSP, Inc.; Energy Dynamics,

Inc.; Freeman United Coal Mining Company; Industry Development Corporation; Marblehead Lime Company; Material Energy Sales Corporation; Material Service Corporation of Indiana; Material Service Foundation; Mineral and Land Resources Corporation; MLRT, Inc.; MSC Realty & Development Co.; Powell & Minnock Brick Works, Inc.; Producers Construction Co.; Producers Supply Company; Producers Towing Company; Republic Resources Corporation; Utah Marblehead Lime Company; Viking International Petroleum Corp.; Vow Conco Construction Company, Inc.; Patriot I Shipping Corp.; Patriot II Shipping Corp.; Patriot IV Shipping Corp.; Quincy Corporation; S-C 1951 Credit Corporation; S-C 1969 Credit Corporation; A.T. Sales Ltd.; Convair Aircraft Corporation; Convair Corporation; Braintree I Equity Corporation; Braintree II Equity Corporation; Braintree III Equity Corporation; Braintree IV Equity Corporation; Braintree V Equity Corporation; The Elco Company; Electric Boat Company; Freeman Coal Mining Limited; GDAT Corporation; General Dynamics Communications Company; General Dynamics Kabushiki Kaisha; General Dynamics Limited; General Dynamics Manufacturing Limited; General Dynamics of Turkey Incorporated; Hulcher Quarry Inc.; Indian Point Limestone, Inc.; Kammerer Products Company; Lexington I Maritime Corp.; Lexington III Maritime Corp.; Lexington IV Maritime Corp.; Lexington V Maritime Corp.; Material Service Industries, Inc.; Patriot III Shipping Corp.; Patriot V Shipping Corp.; Resources Corporation; The Elco Company; Thornton Quarries Corporation; and United Electric Corporation. There is no parent company of respondent General Dynamics Corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS GENERAL DYNAMICS CORPORATION AND CHARLES W. KESSEL

Respondents General Dynamics Corporation ("General Dynamics") and Charles W. Kessel respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

OPINIONS AND JUDGMENTS BELOW

The July 30, 1987 opinion of the United States Court of Appeals for the Ninth Circuit is reported at

823 F.2d 1328 and reproduced in the Appendix to the Petition for Writ of Certiorari ("Petitioner's Appendix") at Appendix C. The district court's December 28, 1988 unreported findings of uncontroverted facts and conclusions of law, and corresponding summary judgment in favor of respondents General Dynamics and Kessel are reproduced in Petitioner's Appendix B at pages 40-54. The Ninth Circuit Court of Appeals decision directly below affirming respondents' summary judgment and from which petitioner seeks a writ of certiorari is reported at 944 F.2d 483 and reproduced in its prepublished form at Petitioner's Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment in favor of all respondents on September 6, 1991. On December 2, 1991, petitioner filed the instant petition and invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). On January 7, 1992, pursuant to the request of respondents General Dynamics and Kessel, all respondents were granted an extension of time within which to file a response to the petition to and including February 4, 1992. On January 28, 1992, pursuant to the request of the Solicitor General, on behalf of all the other respondents (the United States of America, John Lehman, Secretary of the Navy, and Navy personnel Carl Jensen, K.D. Tillotson and Richard Day), all respondents were granted an extension of time within which to file a response to the petition to and including March 4, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

There are no federal statutes involved with respect to the claims and issues pertaining to respondents General Dynamics and Kessel.

STATEMENT OF THE CASE

A. Procedural Background.

This action arises principally out of two August 1982 searches of petitioner's office at his former workplace, the Naval Industrial Ordnance Plant in Pomona, California (the "Facility"). The first search, limited to a credenza in the office assigned to petitioner, was conducted on August 9 by respondent Charles Kessel, a General Dynamics security investigator. The second search was conducted on August 10 by respondents Carl Jensen, a special agent for the Naval Investigative Service, and K.D. Tillotson, Navy Commanding Officer at the Facility. Petitioner contends that the searches and his subsequent discharge from the Naval Reserves violated various of his constitutional rights.

The facts of the case are set forth in the decisions below, specifically the Ninth Circuit's reported decision at 944 F.2d 483, and the district court's unreported findings of uncontroverted facts and conclusions of law at Petitioner's Appendix B.[1] As those decisions indicate, petitioner has raised separate claims, based upon distinct events, against the various respondents in this action.

Petitioner's single claim against respondents General Dynamics and Kessel is brought under a constitutional theory of liability established in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[2] That claim is predicated upon petitioner's contention that Kessel's August 9 search of his office credenza violated his Fourth Amendment rights. This brief in opposition to the petition for writ of certiorari addresses solely the summary judgment in favor of respondents General Dynamics and Kessel, which was affirmed by the Ninth Circuit.

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[1] Respondents object to two documents attached to petitioner's Appendix, specifically page 1 of Appendix F and page 1 of Appendix H. Those documents were not part of the record when the district court granted respondents' summary judgment motion. Although those documents have no relevance to whether the instant petition should be granted, respondents object to those documents here under Supreme Court Rule 15.1, which requires respondents to point out misstatements of the record in this opposition brief.

[2] Petitioner alleged a cryptic conspiracy claim against certain of the respondents, although it has never been clear which respondents. Nevertheless, petitioner expressly stated that "he has chosen not to address the conspiracy charge in this [petition] for purposes of narrowing the scope of the Supreme Court review to essential Constitutional issues." Petition at 8 n.2.

For purposes of their summary judgment motion only, private respondents Kessel and General Dynamics assumed they were federal government agents acting under color of federal authority, but argued that petitioner's *Bivens* claim nevertheless failed for numerous reasons. In particular, as both the district court and the Ninth Circuit ruled, the undisputed evidence demonstrated petitioner did not have a reasonable expectation of privacy in his office or the credenza contained therein.[3] Thus, petitioner's Fourth Amendment rights were not implicated, let alone violated, by Kessel's limited August 9 search of petitioner's credenza (or by the subsequent August 10 search of petitioner's office by the federal respondents).[4]

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[3] In an earlier decision, at 823 F.2d 1328 (Petitioner's Appendix C), the Ninth Circuit reversed the district court's ruling granting respondents' motion to dismiss, which argued petitioner failed to allege sufficient facts to establish that he had a reasonable expectation of privacy. In so ruling, the Ninth Circuit applied this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and concluded that, in deciding whether petitioner had a reasonable expectation of privacy, the district court needed to examine the "operational realities" of petitioner's workplace to determine whether petitioner was on notice that searches of the type conducted might occur from time to time. *See* 823 F.2d at 1334-35. That was precisely the analysis engaged in by the district court and the Ninth Circuit in granting and affirming, respondents' summary judgment motion, respectively. Petitioner's Appendix B at 49-50; 944 F.2d at 488-89.

[4] The district court also ruled that, assuming petitioner had a reasonable expectation of privacy, Kessel and General Dynamics were still entitled to summary judgment on the following alternative and independent grounds: (1) Kessel's limited search was a workplace search that was reasonable under all the circumstances; (2) Kessel's limited search was a valid administrative

Accordingly, the lone issue here with respect to respondents General Dynamics and Kessel is simply whether the lower courts correctly concluded that petitioner did not maintain a reasonable expectation of privacy in his office credenza. Respondents respectfully submit that that factual issue does not warrant the exercise of this Court's discretionary review power.

B. Factual Background.

1. Security Measures At The Facility Are Extensive And Well Understood By Facility Personnel.

At all times relevant to this action, petitioner was employed by the United States Navy and worked at the Facility. 944 F.2d at 485. The Facility houses a wide variety of secret and top-secret military weapons, and is used for designing, manufacturing and testing such weapons. *Id.* In his capacities as an engineer and Chief Warrant Officer of the Navy, petitioner worked directly on secret and top-secret weapons-related projects at the Facility. *Id.* Accordingly, petitioner was required to hold a "secret" security classification. *Id.*

Although the Facility is owned by the Navy, it is jointly operated by General Dynamics, which provides security services for the Facility. *Id.* Because of the Facility's highly sensitive operations, the security precautions taken and implemented at the facility by

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inspection in a highly-regulated industry; and (3) respondents were entitled to qualified immunity for Kessel's limited search. Petitioner's Appendix B at 50-53. The Ninth Circuit did not address any of those alternative rulings because it affirmed the dispositive factual ruling that petitioner did not have a reasonable expectation of privacy. 944 F.2d at 487 n.4.

General Dynamics are extensive. *Id.* Indeed, as the Ninth Circuit found, "[u]pon entering and leaving [a] building, and in the innermost recesses of their offices, employees [are] being constantly searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place." *Id.* at 488.

As a thirteen year employee at the Facility, petitioner was well aware of General Dynamics' extensive security procedures at the Facility. *See id.* at 485. For example, he personally observed his office being searched on numerous occasions by General Dynamics security personnel. *See id.* Additionally, petitioner "was well aware that every time an employee entered or exited the Facility, the employee and the employee's belongings, including all packages, briefcases and purses, were subject to search regardless of the employee's consent, by guards at pedestrian entrances to the Facility and by guards at vehicle gates who had the authority to search all vehicles arriving at or departing from the Facility, including the glove compartments, trunks and closed containers inside a vehicle or trunk." Petitioner's Appendix B at 44.

Further, like all Facility personnel, petitioner regularly attended mandatory security briefings, at which Facility personnel were instructed on all security measures in place at the Facility and the purposes therefor. *See* 944 F.2d at 485. "In those briefings, they [Facility personnel] were made aware that the Navy's security concerns extended beyond physical protection of classified documents, and included concerns that employees not divulge classified information to inappropriate sources." *Id.* In particular, the

Navy concerns "encompassed a variety of conditions which might compromise an employee's ability to maintain security, including those which might make an employee susceptible to blackmail." *Id.* In that regard, petitioner admitted he was aware "that the Navy was concerned employees might be tempted to sell classified information, or might be either induced or blackmailed into divulging information as a result of a romantic liaison." *Id.* at 488 n.5.

2. Employee Offices And Their Contents Are Frequently Searched.

As noted above, as part of the extensive security measures in place at the Facility, individual employee offices and their contents are subject to a variety of frequent searches. Further, as described below, the searches are often conducted in the absence of the individuals to whom the offices are assigned, and often involve searching locked offices and locked areas within offices.

Among the various types of individual office searches are searches conducted by General Dynamics security guards, who check working spaces for security violations. *See id.* at 485. Those searches are conducted frequently, and on both scheduled and random bases. *Id.* Pursuant to such guard searches, petitioner's office was searched daily, in his absence. *Id.* Further, the General Dynamics guards possessed keys to petitioner's office and searched his office for security violations even when his office was locked. *See id.* at 485, 488.

In addition to the frequent scheduled and random searches conducted by security guards, employees also conduct security checks of their fellow employees' of-

fices. *See id.* Like the searches conducted by security guards, employees extensively check each other for security violations. *See id.* For example, when petitioner checked his colleagues' offices, "he would pull on drawers to see whether they were locked and, if they were not, he 'might be inclined to look inside and see if there were any documents lying loose, classified documents.'" *Id.*

In addition to security guard and employee searches, General Dynamics' security investigators also conduct office searches. *See id.* at 485. The security investigators have extensive responsibility for conducting investigations into any possible compromises of security brought to their attention. *See id.* "In Schowengerdt's words, these investigators were authorized to 'look into more things than a guard would look into, . . . [into] details that a guard would not be expected to look into, trying to determine what happened in a situation.'" *Id.* (ellipsis and bracketed text in original).

To carry out their broad function, General Dynamics' security investigators, like the security guards, have access to keys to employee offices, as well as to the furniture within offices. *See id.* at 485, 488. In that regard, petitioner "was well aware that security investigators had access to duplicate keys should they wish to pursue an investigation into his locked desk or credenza." *Id.* at 488.

3. Kessel's Limited Search Of The Credenza Disclosed Materials Indicating A Compromise Of Security.

On August 9, 1982, General Dynamics security investigator Kessel conducted a limited search of the credenza in the office assigned to petitioner, which was located in Building 4, where particularly sensitive

military and national security documents and hardware are stored. *Id.* at 485; *see* Petitioner's Appendix B at 44. That search was precipitated by an anonymous telephone tip, which stated that "material of interest to the security department" was contained in the credenza in petitioner's office. 944 F.2d at 485.

Kessel confined his search to the place (the credenza) where the informant said the material would be found. *Id.* In that place, Kessel found a manila envelope with the following inscription on the outside: "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it." *Id.* The manila envelope contained correspondence and photographs concerning petitioner's involvement in various heterosexual and bisexual activities. *Id.* Additionally, the correspondence demonstrated that petitioner solicited such sexual encounters through ads placed in "swingers" magazines and sexually-oriented organizations. *See id.*

In addition to the inscription on the outside of the manila envelope—which itself suggested petitioner had something to hide—the correspondence within the envelope contained evidence suggesting petitioner may have compromised security on numerous occasions. *Id.* at 486 n.2. In that regard:

> [S]everal of [petitioner's] letters soliciting sexual liaisons made reference to the fact that he worked for the Navy as a missile engineer, and included his office telephone number and his Navy engineer business card; he included photographs of himself in his Navy uniform, as well as nude; and one letter from an Italian stewardess indicated

that she was seeking sexual relationships primarily with servicemen.

Id.

4. Petitioner Conceded The Decision To Search His Credenza Was Warranted.

As noted above, petitioner was aware that security investigators were accorded broad investigatory powers, and that they had access to keys to offices and the furniture within offices. *Id.* at 485, 488. Moreover, petitioner acknowledged that such investigations were warranted "*when*[*ever*] *an indication that a security compromise has been made* or is being contemplated by an employee *because of some reason which has come to their attention* or there is evidence of theft, etc." *Id.* at 489 n.6 (emphasis in original). Accordingly, petitioner conceded that Kessel's decision to search his credenza—which was triggered by a tip suggesting a security compromise—was warranted. *Id.*

5. The Events After August 9, 1982 Do Not Involve Respondents General Dynamics And Kessel.

As indicated above, petitioner testified that the Navy was particularly concerned employees "might be either induced or blackmailed into divulging information as a result of a romantic or sexual liaison." *Id.* at 488 n.5. Certainly, "the inscription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail." *Id.* at 488-89. Additionally, the correspondence within the envelope furthered the possibility that security was compromised in that regard. *Id.* at 486 n.2. Thus, on August 10, the day after he found the manila envelope, Kessel

turned it over to the Navy.[5] *Id.* Specifically, Kessel gave the materials to Lieutenant K.D. Tillotson, the Navy Commander at the Facility. *Id.*

On August 10, the same day he received the materials from Kessel, Tillotson, along with Naval Investigative Service special agent Carl Jensen, conducted a search of petitioner's office.[6] That search was authorized by Jensen's Navy supervisor. 944 F.2d at 485; *see* Petitioner's Appendix B at 47. During that search, the Navy seized additional items from petitioner's office. 944 F.2d at 485.

The events occurring after Kessel turned over the manila envelope and its contents to the Navy do not involve private respondents Kessel and General Dynamics. Those events, which eventually resulted in petitioner's discharge from the Naval Reserve for being bisexual, involve the other (federal) respondents. Indeed, in his brief to the Ninth Circuit, petitioner acknowledged that the alleged involvement of Kessel and General Dynamics in the events underlying this action ended when Kessel turned over to the Navy the manila envelope and its contents.

SUMMARY OF ARGUMENT

As both the district court and the Ninth Circuit held, respondents Kessel and General Dynamics were

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[5] General Dynamics is obligated to report to the Navy any information suggesting the possible compromise of security. Petitioner's Appendix B at 47.

[6] Kessel was present at the second search, but he did not actively participate in it. Petitioner's Appendix B at 47. However, even if Kessel had actively participated in that search, it would not affect whether, as a factual matter, petitioner had a reasonable expectation of privacy in his office or the credenza therein.

entitled to summary judgment because the undisputed evidence established petitioner did not have a reasonable expectation of privacy in his office or the credenza therein. Petitioner's Appendix B at 49-50; 944 F.2d at 488-89. Thus, the limited August 9 search by Kessel (and the August 10 search by the federal defendants) did not implicate, let alone violate, petitioner's Fourth Amendment rights. As the Ninth Circuit stated:

> The district court concluded that "the operational realities" of Schowengerdt's workplace precluded his having an objectively reasonable expectation of privacy in his office, desk or credenza. After *de novo* review of that conclusion, [citation omitted], we agree. Petitioner may have had a subjective expectation of privacy in his credenza, or the manila envelope in it, but that expectation was not objectively reasonable.

944 F.2d at 488.

Petitioner's instant petition for a writ of certiorari essentially amounts to a request that this Court review the lower courts' factual determination that he did not have a reasonable expectation of privacy. Respondents respectfully submit that such a request is hardly a "special and important reason" for the Court to exercise its certiorari discretion. *See* Sup. Ct. R. 10.1. Nor does the petition even remotely implicate any of the enumerated reasons set forth in Supreme Court Rule 10.1 for the issuance of a writ of certiorari. In fact, this Court has repeatedly recognized that certiorari is not proper for reviewing factual determinations.

In short, petitioner's request that the Court review the lower courts' factual determination is misplaced. Moreover, even if the Court were inclined to entertain such an inquiry, respondents respectfully submit that the undisputed evidence mandates the conclusion independently reached by each of the lower courts—that petitioner did not maintain a reasonable expectation of privacy in his office or the credenza.

REASONS FOR DENYING THE PETITION

I

THE NINTH CIRCUIT'S FOURTH AMENDMENT FACTUAL ANALYSIS IS CONSISTENT WITH THE FOURTH AMENDMENT DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER CIRCUIT COURT

At page 11 of his petition, petitioner asserts that "[t]he decision of the Circuit Court in affirming the District Court's ruling is at variance with several major rulings in other circuit courts as well as in the Supreme Court." Petition at 11. In support of that position, in the section of his petition on the Fourth Amendment (pages 13-16), plaintiff cites cases which demonstrate that he misunderstands both the Ninth Circuit's ruling below and the cases upon which he relies. The Ninth Circuit's decision is entirely consistent with the decisions of this Court and the other circuits, and there is no basis for certiorari review.

This Court has made clear that the seminal inquiry in a Fourth Amendment analysis is whether "the person invoking its protection can claim a 'justifiable,' 'reasonable,' or 'legitimate expectation of privacy' that

has been invaded by government action."[7] *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Thus, petitioner's Fourth Amendment rights were implicated only if Kessel's search of the credenza infringed "an expectation of privacy that society is prepared to consider reasonable." *Id.*; *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Accordingly, the Ninth Circuit's factual analysis—whether petitioner had a reasonable expectation of privacy—was not only consistent with, but was compelled by, the legal standards established in this Court's Fourth Amendment decisions.

In his section on the Fourth Amendment, petitioner cites only one Supreme Court case, *O'Connor v. Ortega*, 480 U.S. 709 (1987), which he claims is in conflict with the Ninth Circuit's ruling. However, that case is entirely consistent with the Court's other Fourth Amendment cases, and, correspondingly, the Ninth Circuit's factual analysis. Indeed, in *O'Connor*, the Court stated that "[o]ur cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if the conduct of the Hospital officials at issue in this case infringed 'an expectation of privacy that society is prepared to consider reasonable.'" *Id.* at 715 (plurality opinion), quoting *United States v. Jacobsen*, 466 U.S. at 113; *see also id.* at 737 (Blackmun, J., dissenting). More specifically, eight justices indicated that, in the workplace context, whether an employee's expectation of privacy is reasonable turns upon the "operational realities of the workplace." *Id.* at 1497 (plurality opinion); *id.* at 1508 (Blackmun, J.,

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[7] Again, respondents Kessel and General Dynamics assumed only for purposes of their summary judgment motion that they were federal agents acting under color of federal authority.

dissenting). That was the precise standard applied by the Ninth Circuit in this case. *See* 944 F.2d at 488.

Nevertheless, petitioner apparently contends the Ninth Circuit's ruling conflicts with *O'Connor* because, in *O'Connor*, "a majority of the Court agree[d] with the determination of the Court of Appeals that [the] respondent [in *O'Connor*] had a reasonable expectation of privacy in his office." *See* Petition at 14. Petitioner's apparent position is clearly misplaced. *O'Connor* was obviously decided on the particular facts present in that case, and does not resolve the factual issue here, which turns upon its own (and entirely different) facts. Indeed, as the Court stated in *O'Connor*, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *O'Connor*, 480 U.S. at 718; *see also id.* at 733. The Ninth Circuit's factual determination concerning petitioner's privacy expectation was based upon its analysis of the undisputed, particular operational realities at petitioner's workplace and is therefore entirely consistent with *O'Connor*.

Given that the Ninth Circuit's factual determination is consistent with this Court's Fourth Amendment standard, it is inconceivable that the Ninth Circuit's factual determination could be in conflict with a decision of any other circuit court. Moreover, the three circuit court decisions cited by petitioner—each of which predated *O'Connor*—unlike the Ninth Circuit's ruling, did not turn upon whether the individual had a reasonable expectation of privacy in the place

searched.[8] Petitioner's cited cases are clearly inapposite.

In short, the Ninth Circuit's factual determination does not conflict with any decision of this Court or any other circuit court.

II

IT IS NEITHER APPROPRIATE NOR NECESSARY FOR THE COURT TO REVIEW THE NINTH CIRCUIT'S FACTUAL DETERMINATION

As explained above, with respect to respondents General Dynamics and Kessel, the instant petition amounts to a request that the Court review the Ninth Circuit's *de novo* factual determination that, based upon the operational realities of his workplace, petitioner did not have a reasonable expectation of privacy in his office or the credenza. However, this Court has repeatedly ruled that certiorari review is simply not appropriate for the purpose of reviewing lower courts' factual rulings. *E.g.*, *Texas v. Mead*, 465 U.S. 1041, 1043 (1984), *mem. denying cert. to* 645

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[8] In *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973), the Fourth Amendment issue was whether planting an electronic surveillance device in the individual's office constituted a trespass, and the court concluded it did not. In *United States v. Blok*, 188 F.2d 1019, 1019, 1021 (D.C. Cir. 1950), the court addressed whether, without a warrant, the police could search the individual's office specifically for evidence that the individual committed a crime, petty larceny. In *Williams v. Collins*, 728 F.2d 721, 728 (5th Cir. 1984), the court ruled that various federal actors were entitled to absolute immunity from tort liability for various actions, including searching the individual's office and desk, in which the court concluded, "[i]t is by no means certain [he] had a reasonable expectation of privacy . . . ."

S.W.2d 279 (1983) and 656 S.W.2d 494 (1983) (Stevens, J.) ("'We do not grant a certiorari to review evidence and discuss specific facts.'") (citation omitted); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (*per curiam*) ("[U]ltimate facts are subject to the 'clearly erroneous' rule, and their review would be of no importance save to the litigants themselves."); *N. L. R. B. v. Hendricks County, Etc.*, 454 U.S. 170, 176 n.8 (1981).

Indeed, the principle is so well settled that this Court has dismissed writs of certiorari where subsequent developments demonstrated the Court was essentially faced with deciding factual issues. *E.g.*, *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (where the litigants agreed on the resolution of the ultimate legal issue, leaving only the review of a factual determination, "[t]he appropriate disposition in such a situation is to dismiss the writ as improvidently granted."); *N. L. R. B. v. Hendricks County, Etc.*, 454 U.S. 170, 176 n.8 (1981) ("After briefing and argument . . . we are persuaded that our grant of certiorari on the cross-petition was improvident. The Court of Appeals held that the evidence in the record supported the Board's finding . . . . As such, we are presented primarily with a question of fact, which does not merit Court review.")

In accordance with the Court's prior decisions, respondents General Dynamics and Kessel submit it would be inappropriate for the Court to review the lower courts' factual determination that petitioner did not have an objectively reasonable expectation of privacy.

Additionally, in any event, the Ninth Circuit's *de novo* factual determination was clearly correct. As the

detailed facts set forth above (see "Factual Background" section) demonstrate, petitioner was fully aware of the extensive security practices and procedures at the Facility whereby "employees were being constantly searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place." *Schowengerdt*, 944 F.2d at 488.

In particular, petitioner was aware that, in his "peculiarly unprivate work environment," his office and its contents were subject to extensive searches, even in his absence. *Id.* Moreover, he was aware that General Dynamics security guards and investigators had access to keys to conduct such searches, and that security investigators, like respondent Kessel, had broad authority to investigate any possible compromise of security. *Id.* Petitioner also admitted that the Navy is particularly concerned that its employees might be blackmailed into divulging classified information as a result of a sexual liaison of the type solicited by the correspondence found in petitioner's credenza. *Id.* at n.5.

In light of the undisputed operational realities in place at petitioner's workplace, the inescapable conclusion is that reached by the Ninth Circuit:

> Given that peculiar environment, Schowengerdt did not have a reasonable expectation of privacy in his office or in his locked credenza, or in a manila envelope stored in the credenza which indicated on its exterior that it contained information that he wanted kept secret from his wife. He should have known that his credenza, even if locked, was subject to search, and that the in-

> scription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail. In short, Schowengerdt was "on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes."

Id. at 488-89 (citation omitted).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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